FILE COPY

Office - Supreme
FIL
OCT
CHARLES EL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 18

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, a Corporation, *Petitioner*,

v.

ESTATE OF ELVIRA J. PARKS, Deceased, *Respondent*.

BRIEF OF PETITIONER.

OTIS F. GLENN,
GEORGE P. BARSE,
J. H. BREWER, JR.,
Attorneys for Petitioner.

R. G. REAL,
HAROLD E. BAILY,
Of Counsel.

BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

SUBJECT INDEX.

		Page
I.	Opinions and Judgments Below	1
II.	Jurisdiction	1
III.	Statement of the Case	2
IV.	Specification of Errors	5
V.	Questions Presented	5
VI.	Statutes Involved	6
VII.	Summary of Argument	6
VIII.	Argument	8

(A) The contingent assessment liability of Elvira J. Parks upon 12 shares of stock of the Austin National Bank of Chicago standing in her name survived her death and consequently the estate remained liable and the contingent assessment liability ripened into absolute liability when the assessment was levied on May 21, 1931, at which time the estate was still in process of administration and undistributed inventoried assets of value far in excess of the assessment claim were and are in the hands of the executors. Section 5152, U. S. R. S. (Title 12, U. S. C., Sec.66) expressly provides that the estates and funds in the hands of persons holding stock as executors shall be liable for stock assessment in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name. This provision shows a clear intent on the part of Congress that the liability, as limited and defined by Section 66, Title 12, U. S. C., shall extend to the estate of a deceased shareholder for the bene-

Page

fit of the creditors of an insolvent national bank. The fiduciaries are exempt, *but the property belonging to the estate in their hands is liable,* as would be the deceased, if living.

This obligation of the estate continues unimpaired until valid assignment of the shares by final distribution of the estate..... 8

(B) The Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes 1935; Sec. 70 Ill. Adm. Act), providing that claims of any class not exhibited to the court within one year from the granting of Letters of Administration shall be forever barred from sharing in the distribution of the inventoried assets, does not relieve the estate and the undistributed inventoried assets in the hands of the executors from the obligation and liability for stock assessment imposed by the Federal law. (Sec. 66, Title 12, U. S. C.) 10

(C) The enforcement of the liability imposed by Section 66, Title 12, U. S. C., may not be thwarted or impeded by state law which discriminates against or is inadequate for the just and convenient collection of the amount of the assessment. To require the petitioner to collect his claim in accordance with the laws of Illinois governing claims against estates of deceased persons, would compel him to proceed in a manner inadequate for the just and convenient enforcement of a liability specifically imposed by the Federal statute, (Sec. 66, Title 12, U. S. C.), thus discriminating against and impeding the collection of a liability imposed by the national authority 22

Conclusion 29

Appendix 30

CASES CITED

Page

Allen, Commissioner of Banks, v. Hanover Trust Co., 142 N. E. 105, 106, 107 21
Baird v. McMillan, 205 N. W. 682, 683, 684; 41 A. L. R. 177 21
Beebe v. Kirkpatrick, 321 Ill. 612; 152 N. E. 539 22
Below, Receiver of The First Nat'l Bank of Ridgefarm, Ill. v. First Nat'l Bank of Danville, Ill., (E. D. Ill.), decided July 31, 1936 (Appendix, pp. 33-43) 15
Chicago Title & Trust Co. v. Corp. of Fine Arts Bldg., 288 Ill. 142; 123 N. E. 300 22
Cook County Nat'l Bank v. United States, 107 U. S. 445, 448 18
Davis v. Elmira Savings Bank, 161 U. S. 275, 283, 284 .. 19
Davis v. Weed, 7 Fed. Cas. 186, 190, 191 16
Drain v. Stough, (C. C. A. 9), 61 Fed. (2d) 668, 669 ..9, 12
Drake, Receiver of the First National Bank of Monticello, Ill. v. Annie Dilatush, (E. D. Ill.), decided May 11, 1936 (Appendix pp. 44-55) 16, 23
Durflinger v. Arnold, 329 Ill. 93; 160 N. E. 172 .....22, 23
Easton v. Iowa, 188 U. S. 220, 229 19
Foreman State Trust & Sav. Bk. v. Tauber, 348 Ill. 280; 180 N. E. 827 23
Forrest v. Jack, 294 U. S. 158, 162, 163 9, 10, 11, 12, 18, 23, 25, 26
Gilbertson v. McCarthy, (C. C. A. 8), 32 Fed. (2d) 665, 667, 668 16
Hantzch v. Massolt, 63 N. W. 1069-1072, 62 Minn. 361. 21
Jennings v. U. S. F. & G. Co., 294 U. S. 216, 226..... 19
Johnson v. Libby, 88 Atl. 647, 650, 651 21
Kennedy v. Gibson, 8 Wall. 498, 505 28
Kingston v. Old National Bank of Centralia, (1934), 359 Ill. 192; 194 N. E. 213, 219 21
Korbly v. Springfield Inst. for Savings, 245 U. S. 330, 333 28
Lewis v. Fidelity & Deposit Co. of Md., 292 U. S. 559, 566 19
Luce v. Thompson, (C. C. A. 8), 36 Fed. (2d) 183, 184, 185 16
Mann v. Kleisdorff, 16 Fed. (2d) 997, 998..... 16
Matteson v. Dent, 176 U. S. 521, 524 .....9, 16, 26
Miller & Lux v. Katz, 102 Pac. 946, 947 21

Page

Morse v. Pacific Ry. Co., 191 Ill. 356; 61 N. E. 104 22
Mortimer et al. v. Potter, 213 Ill. 178; 72 N. E. 817 19
Parker v. Robinson, (C. C. A. 1), 71 Fed. 256, 257 16
Pearson et al. v. McBean et al., 231 Ill. 536; 83 N. E. 173 22
Rankin v. Miller, 207 Fed. 602, 612 16
Richmond v. Irons, 121 U. S. 27, 55, 56 9
Rassieur v. Jenkins, 170 Ill. 503; 48 N. E. 976 22
Ryan v. Jones, 15 Ill. 1 22
Seabury v. Green, 294 U. S. 165, 168, 169 .....2, 9, 11
Springhorn v. Dirks, 231 Pac. 912, 915 21
Stone v. Clarke, 40 Ill. 411 22
Tierney v. Shakespeare, 284 Pac. 1019, 1020 21
Union Trust Co. v. Shoemaker, 258 Ill. 564; 101 N. E. 1050 22
Zimmerman v. Carpenter, 84 Fed. 747, 750, 751 ....9, 11, 21

STATUTES

Chapter 110, Par. 203 (2), Illinois State Bar Statutes, 1935 30
Section 64, Title 12, U. S. C. 2, 5, 6, 10
Section 66, Title 12, U. S. C. 2, 5, 6, 9, 10, 18, 19, 21, 22
Section 70, Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935) 5, 6, 7, 10, 15, 22, 23
Section 237 (b) of the Judicial Code, (U. S. C., Title 28, Ch. 9, Sec. 344 (b)) 1
Section 5152, U. S. R. S., (Title 12, U. S. C., Sec. 66) .. 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 18

M. J. PUFAHL, RECEIVER OF THE AUSTIN NATIONAL BANK OF CHICAGO, ILLINOIS, a Corporation, *Petitioner*,

v.

ESTATE OF ELVIRA J. PARKS, Deceased, *Respondent*.

BRIEF OF PETITIONER.

I.

OPINIONS AND JUDGMENT BELOW.

The opinion of the Appellate Court, First District, State of Illinois, is reported in 283 Ill. App. 95, and appears in the record at pages 20 to 24. The special findings of fact, propositions at law, and judgment of the Circuit Court of Cook County are not reported, but appear in the record at pages 5, 6 and 7.

II.

JURISDICTION.

Writ of certiorari was granted on the 27th day of April, 1936 (R. 27), under Section 237 (b) of the Judicial Code, (U. S. C., Title 28, Ch. 9, Sec. 344 (b)), providing for the

granting of a writ of certiorari by this court to review a final judgment or decree of the highest court of a State in which a decision could be had in a suit:

> "where any title, right, privilege, or immunity, is specially set up or claimed by either party under the Constitution, or any treaty or statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the said claim is sustained as where it is denied * * *."

Determination of the issue of whether the estate of Elvira J. Parks and the undistributed inventoried assets of said estate in the hands of the executors are liable for the stock assessment is clearly a Federal question involving the construction of the assessment statutes, (Sections 64 and 66, Ch. 2, Title 12, U. S. C.). (Appendix pp. 30-31.)

In *Seabury* v. *Green*, 294 U. S. 165, at page 168, this court said:

> "Respondent maintains that no Federal question is involved. To the extent that the opinion implies that liability of stockholders of national banks is a creature of or depends upon a statute of South Carolina, the suggestion is so plainly without foundation as to suggest that it must have been inadvertently made. The court's ruling that the estate is not liable for the assessment necessarily depends upon its construction of Section 66. The judgment is reviewable here under Section 237 (b), Judicial Code."

III.

STATEMENT OF THE CASE.

The petitioner, M. J. Pufahl, as Receiver of the Austin National Bank of Chicago, Illinois, instituted proceedings in the Probate Court of Cook County, Illinois, on September 1, 1933, (R. 10) to enforce collection of an assessment in the sum of $1,200.00 on national bank stock owned by the respondents, Philip W. Huston and Frank M. Pray, as ex-

ecutors of the estate of Elvira J. Parks, deceased, as the estate was still open and there had been no final distribution thereof, (R. 10) and according to the stipulation (R. 26) there were inventoried assets in the hands of the executors, the value of which exceeded the amount of the claim of the petitioner. The Probate Court denied the claim of the petitioner, (R. 4) and upon appeal to the Circuit Court of Cook County, Illinois, the case was tried *de novo* and without formal pleadings, in accordance with the Illinois practice. Judgment was entered in the Circuit Court disallowing the claim of the petitioner as against the undistributed assets of the estate inventoried within one year from the date of granting of Letters Testamentary, but allowing said claim as to assets not inventoried within the year (R. 7). (No additional assets were thereafter discovered or inventoried. R. 26) On appeal to the Appellate Court, First District, State of Illinois, the judgment of the Circuit Court was affirmed (R. 17, 24). Petition for certificate of importance for leave to appeal to the Supreme Court of Illinois was denied January 8, 1936 (R. 19, 20). Petition for writ of certiorari filed by the petitioner was granted by this court on the 27th day of April, 1936 (R. 27).

The facts as stipulated by the parties (R. 9-11) are substantially as follows:

On March 30, 1931, the Comptroller of the Currency of the United States declared the Austin National Bank to be insolvent, and thereupon closed said bank. On April 6, 1931, the Comptroller of the Currency appointed M. J. Pufahl as Receiver of said bank (R. 9).

On May 21, 1931, the Comptroller of the Currency made an assessment upon all the stockholders of said bank equal to 100 per cent of the par value of the stock of said bank owned by each of said stockholders, including an assessment against the respondents, Philip W. Huston and Frank M. Pray, as executors of the Last Will and Testament of Elvira J. Parks, in the amount of $1,200.00, said assessment being in the sum of $100.00 per share on twelve shares of the capital stock of said bank (R. 9).

The Comptroller of the Currency made a demand upon the respondents for the payment of the assessment, as aforesaid, together with interest. Upon the refusal of the respondents to pay said assessment, these proceedings to enforce the assessment were instituted (R. 10).

Elvira J. Parks died March 20, 1928, and at the time of her death she was the owner of twelve shares of capital stock of the Austin National Bank. Letters of Administration were issued by the Probate Court of Cook County, Illinois, to Philip W. Huston and Frank M. Pray on *May 17, 1928,* in the administration proceeding pending therein, entitled "In the matter of the Estate of Elvira J. Parks, deceased". An Inventory and Supplemental Inventory were filed in the Probate Court within one year after the date of issuance of Letters Testamentary (R. 10).

It will be noted that this Inventory had already been filed (R. 10) approximately two years before the assessment was levied by the Comptroller. *However, notwithstanding such Inventory, there has been no final distribution and the estate is still open* (R. 10).

An additional stipulation (R. 26) provides:

"It is hereby stipulated by and between the petitioner M. J. Pufahl as Receiver of the Austin National Bank, Chicago by Otis F. Glenn, his attorney, and respondents, Philip W. Huston and Frank M. Pray as Executors of the estate of Elvira J. Parks, deceased, by Emmett J. McCarthy, their attorney, that there are inventoried assets in the hands of said Executors far in excess of the amount of the claim of the petitioner and that said estate is solvent. It is further stipulated that there are no uninventoried assets discovered subsequent to expiration of one year from the date of granting of Letters Testamentary.

OTIS F. GLENN,
Attorney for Petitioner.

EMMETT J. MCCARTHY,
Attorney for Respondents."

IV.

SPECIFICATION OF ERRORS.

(a) The Appellate Court erred in holding that the liability created by Sections 64 and 66, Title 12, U. S. C. (Appendix pp. 30-31) is not a liability against Philip W. Huston and Frank M. Pray, as executors, enforceable against the inventoried assets in their hands belonging to the estate of Elvira J. Parks, deceased.

(b) The Appellate Court erred in holding that the undistributed inventoried property and funds of the deceased shareholder in the hands of the executors were relieved from the liabilty imposed by the Federal law, (Sections 64 and 66, Title 12, U. S. C.), (Appendix pp. 30-31), by reason of the provisions of the Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935; Section 70, Illinois Administration Act), (Appendix p. 31), requiring claims to be filed against the estate within one year from the granting of Letters Testamentary, in order to share in the inventoried assets; notwithstanding the estate was still in process of administration, and the assessment claim did not accrue until after the time to file claim had expired.

V.

QUESTIONS PRESENTED.

1. Can the liability for a stock assessment arising under the National Banking Act, (Sections 64 and 66, Title 12, U. S. C.), (Appendix pp. 30-31), be enforced against the inventoried assets in the possession of the executors of a decedent's estate in process of administration where the liability did not accrue and the claim thereon could not be filed until after the expiration of the one year limitation period for filing claims specified by Section 70 of the Illinois Administration Act, (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), (Appendix p. 31), which provides that claims against estates of decedents filed after one year

from the granting of Letters of Administration cannot share in the inventoried assets?

2. Is the Illinois Non-Claim Statute (Section 70, of the Illinois Administration Act; Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935, (Appendix p. 31), which bars and excludes from participation in the inventoried assets of the estate of a decedent, claims which have not been filed within one year from the granting of Letters Testamentary or Letters of Administration, effective to bar an assessment claim under the National Banking Laws, (Sections 64 and 66, Title 12, U. S. C.), (Appendix pp. 30-31), which does not arise until after the expiration of the period prescribed by such statute for the filing of claims and where, further, notwithstanding the expiration of such period for filing claims, there has been no final distribution and the estate is still open, and there are undistributed inventoried assets in the hands of the executors valued far in excess of the assessment claim?

VI.

STATUTES INVOLVED.

The statutes involved in the discussion of the case are set forth in the Appendix, *infra*, pages 30-32.

VII.

SUMMARY OF ARGUMENT.

A.

The contingent assessment liability of Elvira J. Parks upon 12 shares of stock of the Austin National Bank of Chicago standing in her name survived her death and consequently the estate remained liable and the contingent assessment liability ripened into absolute liability when the assessment was levied on May 21, 1931, at which time the estate was still in process of administration and undis-

tributed inventoried assets of value far in excess of the assessment claim were and are in the hands of the executors. Section 5152, U. S. R. S., (Title 12, U. S. C., Sec. 66), expressly provides that the estates and funds in the hands of persons holding stock as executors shall be liable for stock assessment in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name. This provision shows a clear intent on the part of Congress that the liability, as limited and defined by Section 66, Title 12, U. S. C., shall extend to the estate of a deceased shareholder for the benefit of the creditors of an insolvent national bank. The fiduciaries are exempt, but the property belonging to the estate in their hands is liable, as would be the deceased, if living. This obligation of the estate continues unimpaired until valid assignment of the shares by final distribution of the estate.

B.

The Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes 1935; Sec. 70, Ill. Adm. Act), providing that claims of any class not exhibited to the court within one year from the granting of Letters of Administration shall be forever barred from sharing in the distribution of the inventoried assets, does not relieve the estate and the undistributed inventoried assets in the hands of the executors from the obligation and liability for stock assessment imposed by the Federal law. (Sec. 66, Title 12, U. S. C.)

C.

The enforcement of the liability imposed by Section 66, Title 12, U. S. C., may not be thwarted or impeded by state law which discriminates against or is inadequate for the just and convenient collection of the amount of the assessment. To require the petitioner to collect his claim in accordance with the laws of Illinois governing claims against estates of deceased persons, would compel him to proceed

in a manner inadequate for the just and convenient enforcement of a liability specifically imposed by the Federal statute, (Sec. 66, Title 12, U. S. C.), thus discriminating against and impeding the collection of a liability imposed by the national authority.

VIII.

ARGUMENT.

A.

The contingent assessment liability of Elvira J. Parks upon 12 shares of stock of the Austin National Bank of Chicago survived her death and consequently the estate remained liable and the contingent assessment liability ripened into absolute liability when the assessment was levied on May 21, 1931, at which time the estate was still in process of administration and undistributed inventoried assets of value far in excess of the assessment claim were and are in the hands of the executors. Section 5152, U. S. R. S., (Title 12, U. S. C., Sec. 66), expressly provides that the estates and funds in the hands of persons holding stock as executors shall be liable for stock assessment in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name. This provision shows a clear intent on the part of Congress that the liability, as limited and defined by Section 66, Title 12, U. S. C., shall extend to the estate of a deceased shareholder for the benefit of the creditors of an insolvent national bank. The fiduciaries are exempt, but the property belonging to the estate in their hands is liable, as would be the deceased, if living. This obligation of the estate continues unimpaired until valid assignment of the shares by final distribution of the estate.

The liability of estates for stock assessment as limited and defined by Sec. 66, Title 12, U. S. C., (Appendix p. 31)

has been universally recognized by decisions of this and other Federal courts. In the recently decided case of *Forrest* v. *Jack*, 294 U. S. 158, it was said at page 162 as follows:

> "The liability of stockholders is based upon the statute, Sec. 64. As a general rule, the person in whose name the stock stands on the books of the bank is liable, but the actual owner may be held although the stock has not been registered in his name. The liability does not altogether cease on the death of the owner but, as limited and defined by Sec. 66, attaches to his estate. The fiduciaries are exempt but the property belonging to the estate is liable as would be the deceased if living. No cause of action arises until the assessment is made by the Comptroller and, so far as concerns the need and amount, his findings are conclusive. He acts under Federal authority, and in respect of determinations, orders and assessments may not be trammeled, controlled or prevented by state laws."

In *Seabury* v. *Green*, *supra*, at page 169, it was said:

> "The obligation continues unimpaired until valid assignment of the shares by final distribution of the estate, if not by an earlier transfer."

The Federal statute, (Sec. 66, Title 12, U. S. C.), (Appendix p. 31) and the decisions construing the same, clearly create a liability upon the estate of a deceased shareholder for the payment of the assessment, specifically excepting therefrom the fiduciaries, as such, but subjecting the property belonging to the estate in their hands to the payment thereof. See also *Matteson* v. *Dent*, 176 U. S. 521, 524; *Richmond* v. *Irons*, 121 U. S. 27, 55, 56; *Zimmerman* v. *Carpenter*, 84 Fed. 747, 751; *Drain* v. *Stough*, 61 Fed. (2d) 668, 669.

B.

The Non-Claim Statute of Illinois, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes 1935; Sec. 70, Ill. Adm. Act), providing that claims of any class not exhibited to the court within one year from the granting of Letters of Administration shall be forever barred from sharing in the distribution of the inventoried assets, does not relieve the estate and the undistributed inventoried assets in the hands of the executors from the obligation and liability for stock assessment imposed by the Federal law. (Sec. 66, Title 12, U. S. C.)

The court below held that the validity of the claim would not be affected in any way by the laws of Illinois, but also held that as to the method of its enforcement the claim was governed by the practice prescribed by state law, and disallowed the claim as to the inventoried assets of the estate (R. 23) by reason of the provisions of the Illinois Non-Claim Statute, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes 1935; Sec. 70, Ill. Adm. Act), (Appendix p. 31) which bars from participation in the distribution of the inventoried assets all claims against estates that are not filed within one year, and based this conclusion upon its construction of the recently decided case of *Forrest* v *Jack, supra.* (R. 23) It is respectfully submitted that the holding in that case decides only that where the estate has been completely extinguished under the laws of that state, the liability subsequently arising under Sections 64 and 66, Title 12, U. S. C., cannot be enforced. There the Receiver was attempting to reach property of the estate of a deceased shareholder. The law of Utah, where the case arose, provided in effect that distribution fully extinguished the estate and that subsequent claims arising against it were thereafter barred. In this connection the court said at page 163:

> "In the absence of federal enactments relating to procedure for enforcement of the liability imposed by Sec. 66, collection is to be made in accordance with state laws governing claims against estates of deceased

persons, at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority. There is no suggestion that the laws of the State of Utah discriminate against or are inadequate for the just and convenient enforcement of liability imposed, Sec. 66, against estates of deceased stockholders. *There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate.*" (Italics inserted)

In the case at bar, the estate of Elvira J. Parks, deceased, is still open and is in process of administration, (R. 10) with undistributed inventoried assets of the estate *in the hands of the executors*, the appraised value of which is far in excess of the assessment claim of the Receiver. (R. 26) Consequently the facts are clearly distinguishable from those in *Forrest* v. *Jack, supra*, and the Federal statute, Sec. 66, Title 12, U. S. C., (Appendix p. 31) by its specific and unqualified provision directly *imposes the liability on the undistributed assets in the hands of the executors.*

The case of *Zimmerman* v. *Carpenter*, 84 Fed. 747, (cited with approval by this court in *Forrest* v. *Jack, supra*, and *Seabury* v. *Green, supra*), is on all fours with the case at bar. There, the time within which a claim could be presented in accordance with state law against the estate of a deceased shareholder, expired in December, 1895. The bank failed in November, 1896, the assessment was levied in February, 1897, and became due one month later. It was contended that the claim was barred by the statute of South Dakota fixing the time within which claims could be presented. The court said at page 750:

"Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an *ordinary claim* against the estate of Charles C. Carpenter, deceased, to be presented and allowed in the manner required by the laws of the State of South Dakota, and, if not so presented and allowed, to be forever barred by the statute of nonclaim of said state, involves a

total misconception of the object, meaning, and effect of sections 5151, 5152, Rev. St. U. S." (Sections 64 and 66, Title 12, U. S. C.) (Parenthesis and italics inserted)

and further at page 751:

"But Congress intended to, and did, provide that the estate of the testator or intestate, in the hands of an executor or administrator, should be liable in like manner, and to the same extent, as the testator or intestate would be if living, and competent to act, and hold the stock. By the language of the section last referred to, the death of the testator or intestate does not in any way affect the liability of the estate of the testator or intestate, *except, if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged.* On the 23d day of November, 1896, when the Dakota National Bank failed, Frances G. Carpenter, as the executrix of the estate of Charles C. Carpenter, deceased, under the laws of the United States and of South Dakota, was a shareholder therein. To the extent of 100 per cent. of the par value of the stock held by her, the estate of Charles C. Carpenter in her hands on that day was liable; not as if Carpenter was dead, but in the same manner, and to the same extent, as if he was living; the clear object of the statute being to make the estate liable for a debt arising after the death of a testator or intestate, as well as those arising before. On the 23d day of November, 1896, so much of the estate of Charles C. Carpenter, deceased, which was in the possession of defendant, as executrix of said Carpenter, on that day, stood not as the estate of a deceased person with reference to the liability on said stock, but in the place of Charles C. Carpenter himself, liable in like manner and to the same extent as he (Carpenter) would have been if alive." (Italics inserted)

The recent case of *Drain* v. *Stough* (C. C. A. 9) 61 F. (2d) 668, (also cited by this court with approval in *Forrest* v. *Jack, supra*), is in point. There it appeared that the decedent stockholder died June 7, 1930, his will being admitted to probate and the executor duly qualified. On June 18,

1930 the notice to creditors was first published. Under the law of the State of Washington, claims were required to be presented to the executor within six months after the first publication of notice to creditors by the executor. The assessment was not levied by the Comptroller of the Currency until January 19, 1931, the bank being closed on November 20, 1930. The lower court held that the claim sued upon was barred by reason of the state law, requiring claims against the decedent to be filed within six months after the first publication of the notice to creditors. The Circuit Court of Appeals reversed the holding of the lower court and said at page 669:

> "We are then to consider the question as to whether the fact that the national bank went into the hands of a receiver after the death of the stockholder created such a claim as must be presented to the executor under the Washington statute (section 1477, et seq., Remington's Compiled Statutes). It will be observed that the notice published by the executor is directed to 'all persons having claims against the deceased to serve the same on the executor or administrator or his attorney of record * * * within six months after the date of the first publication of such notice,' and that, 'if a claim be not filed within the time aforesaid, it shall be barred. * * *' (Italics ours.) Is this a claim 'against the deceased'? At the time of his death the bank was solvent, the stock passed to his executors upon his death and their qualification, with the ultimate ownership in the heirs. The liability of the estate to creditors is fixed by the statute specially applicable, section 5152 R.S. (12 U.S.C.A. Sec. 66), as follows: 'Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.'
>
> "That is to say, the estate is charged with an equitable lien for the assessments properly apportioned to

the stock, and neither the decedent nor the owner of the stock, whether executor, administrator, legatee, or distributee, is personally liable for said assessment, as is the case with other transferees or owners, but the estate left by the decedent is liable. Zimmerman v. Carpenter (C. C.) 84 F. 747. The obligation to the bank's creditors, although arising out of an implied contract of the decedent stockholder, is a statutory obligation. McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437; McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500. *It is well settled that a statute, requiring the presentation of claims against a decedent, does not apply to claims against his estate arising in the course of administration,* that is, to claims against the funds in the hands of the executor or administrator. It was so held under a similar statute of California requiring the presentation of claims to an executor. Miller & Lux v. Katz, 10 Cal. App. 576, 102 P. 946. There the corporate stock was owned by the deceased. After his death the corporate debt was created. It was held that the estate was liable for its proportion of the debt, fixed by statute upon a stockholder, and that the claim therefor need not be presented to the executor. See, also, Plummer v. Light, 139 Wash. 670, 247 P. 1022. The Supreme Court of the state of Montana, with laws similar to Washington and California with reference to the presentation of claims against a decedent, in the case of Springhorn v. Dirks, 72 Mont. 121, 231 P. 912, 915, held, under a state statute identical with section 5152, R.S. (12 U.S.C.A. Sec. 66, supra), it was not necessary to present a claim to the executor of the will of a deceased stockholder in a state bank as a basis for a recovery of the assessment made for the benefit of creditors of the bank, following Zimmerman v. Carpenter (C.C.) 84 F. 747, supra, and Rankin v. Miller (D. C.) 207 F. 602.

"We conclude that the law of the state of Washington did not require the presentation of a claim for either a contingent or accrued liability on stock in a national bank, *where the insolvency of the bank occurred after the death of the stockholder.*" (Italics inserted)

At pages 33-43 of the Appendix will be found the Findings of Fact, Conclusions of Law, Amended Findings of Fact and Conclusions of Law, and Decree of the Honorable Walter C. Lindley, Judge of the District Court of the United States for the Eastern District of Illinois, in the case of *William M. Below, Receiver of The First National Bank of Ridgefarm, Illinois* v. *First National Bank of Danville, Illinois, Administrator with the Will Annexed of the last Will and Testament of Pleasant Mills, deceased.* (Decision July 31, 1936; not yet reported.)

From the Findings of Fact it appears that Pleasant Mills was the record owner of seven shares of the capital stock of the First National Bank of Ridgefarm at the time of his death, which occurred on April 4, 1932, and defendant was thereafter appointed administrator. The bank was subsequently declared insolvent by the Comptroller of the Currency, who appointed the Receiver on October 10, 1933 and levied a stock assessment on January 4, 1934, payable on or before February 13, 1934. Thereafter, the Receiver, on February 2, 1934, filed his claim in the Probate Court for the assessment in the sum of $700.00, which was not allowed on the ground that it was not exhibited to the Probate Court within one year of the issuance of Letters Testamentary as provided by the Illinois Statute, (Section 70 of the Ill: Administration Act; Ch. 3, Par. 71, Section 70, Ill. Revised Statutes, 1935). (Appendix p. 31) Suit was then brought at a time when the estate was still in process of administration and there were in the hands of the administrator substantial assets of the estate which had not been distributed.

The court held that the Receiver's claim should be paid out of the proceeds of the *undistributed assets*, in equal proportion to the sum received by all general creditors whose claims against the estate had been allowed by the Probate Court, and said (Appendix p. 33):

> "The estate has not been completely administered. The proceedings in the probate court are still pending

> and substantial assets remain in the hands of the administrator. The stock was issued to the deceased some years before his death and never transferred. In the absence of proof of such transfer, the estate remains liable. Consequently, the case is governed by Seabury v. Green, 294 U. S. 165 and Forrest v. Jack, 294 U. S. 158, and plaintiff is entitled to the relief prayed.
>
> "Nor does the denial of the claim in the probate court, because of the elapse of a year before filing same, bar this action. As said by the Supreme Court in Seabury v. Green, supra, the enforcement of liability imposed by the federal statutes may not be thwarted or impeded by the state law. See also Zimmerman v. Carpenter, 84 Fed. 747 (CCAB); Mortimer v. Potter, 213 Ill. 178 and authorities cited in 41 A.L.R. 181."

See also the Memorandum Opinion of the same court in the case of *J. B. Drake, Receiver of the First National Bank of Monticello, Illinois* v. *Annie Dilatush, Executrix of the Estate of Frank V. Dilatush, Deceased,* (Decision May 11, 1936; not yet reported) which will be found in the Appendix at pages 44-55.

Attention may be directed by way of cumulative authority to the following assessment cases: *Matteson* v. *Dent,* 176 U. S. 521, 524; *Parker* v. *Robinson,* (C. C. A. 1), 71 Fed. 256, 257; *Rankin* v. *Miller,* 207 Fed. 602, 612; *Luce* v. *Thompson,* (C. C. A. 8), 36 Fed. (2d) 183, 184, 185; *Gilbertson* v. *McCarthy,* (C. C. A. 8), 32 Fed. (2d) 665, 667, 668; *Davis* v. *Weed,* 7 Fed. Cas. 186, 190, 191.

The position of the petitioner and the distinctions to be drawn between the effect of accrual of the assessment claim before and after expiration of the period for filing claims are clearly exemplified by the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Mann* v. *Kleisdorf,* 16 Fed. (2d) 997. There it appeared that an assessment was levied by the Comptroller of the Currency during the lifetime of the stockholder, but suit was not instituted thereon until one year after her death, the execu-

trix being named as defendant. The defendant executrix relied upon a statute in Mississippi which provided that all claims not probated and registered within six months should be barred. *It appeared that the Receiver could have filed his claim within the specified time, inasmuch as the assessment had been levied prior thereto,* but the six months' period for filing claims had expired before the institution of the suit. The court said at pages 997, 998:

> "The liability sought to be enforced dates from the assessment made by the Comptroller of the Currency. Rankin v. Barton, 199 U. S. 228, 26 S. Ct. 29, 50 L. Ed. 163. Under R. S. Sec. 721 (Comp. St. Sec. 1538), there being no federal statute, the law of Mississippi is to be regarded as the rule of decision in this case, and the liability of a stockholder of a national bank, or his executor, is subject to the state statute of limitations. Campbell v. Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. Ed. 280; McDonald v. Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437. It has been held by the Supreme Court of Mississippi that the nonclaim statute in question is a statute of limitations. Miller v. Trustees of Jefferson College, 5 Smedes & M. (Miss.) 651; Cohea v. Commissioners, 7 Smedes & M. (Miss.) 437.
>
> "We are in accord with that view. To the end that estates may be promptly settled, it is the common, if not the universal, policy of the several states to bar by legislation claims against the estates of the dead within a less period of time than is required for the assertion of claims against persons who are living. The provision in R. S. Sec. 5152, to the effect that funds in the hands of the legal representative of a deceased person shall be liable in like manner and to the same extent as the deceased person interested would be, if living, does not have the effect of depriving a state of the power to make a difference in the time within which claims will be barred if not presented, on the one hand, to an executor, or, on the other, to the person interested if he be living. That section has no reference to the time of presentation of a claim, but

only makes the funds in the hands of the legal representative as fully liable as the deceased would be if living. *Doubtless the receiver would not be barred within the six months set up as a bar by the statute of Mississippi, if the assessment had not been made by the Comptroller until after the period covered by the bar of the statute had run. In that event, the receiver would have been entitled to pursue his remedy against the funds of the decedent into whosoever hands they might have come.* (Italics inserted)

"Zimmerman v. Carpenter (C. C.) 84 F. 747, and Springhorn v. Dirks, 72 Mont. 121, 231 P. 912, relied on by plaintiff, do not support a different conclusion. In the first of these cases no claim was asserted against the estate until after the period of limitation had run, whereas in this case the assessment antedated both the death of the stockholder and the appointment of her executrix, and was therefore an existing claim against the estate at the time notice, pursuant to the nonclaim statute was given. In the other case it does not appear whether the assessment was made during the lifetime of the decedent, as was the fact in this case."

Applying the principles laid down in the foregoing cases to the instant case, it appears that the contingent assessment liability of Elvira J. Parks upon the twelve shares of stock survived her death and became a liability of, and an equitable lien upon, her estate, and inasmuch as the estate is still in process of administration and there are in the hands of executors undistributed inventoried assets valued far in excess of the petitioners' claim, (R. 10, 26) the effect of the decision and judgment of the Appellate Court of the First District of the State of Illinois barring the petitioner's claim from participating in the distribution of the inventoried assets, has operated to thwart, impede and possibly completely nullify the enforcement of a liability created by the Federal statute, (Title 12, U. S. C., Sec. 66), (Appendix p. 31). Said decision is in conflict with the principles established by this Honorable Court in *Forrest* v. *Jack, supra; Seabury* v. *Green, supra.* Compare *Cook*

County National Bank v. *United States*, 107 U. S. 445, 448; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283, 284; *Easton* v. *Iowa*, 188 U. S. 220, 229; *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216, 226; *Lewis* v. *Fidelity & Deposit Company of Maryland*, 292 U. S. 559, 566 (to the effect that state law can not impede, thwart, or nullify Federal statutes).

The general doctrine laid down in the foregoing cases clearly establishes the proposition that the national banking laws are a system complete within itself, covering the organization, supervision and liquidation of national banks, and that the laws of the states will not be permitted to discriminate against or interfere with the operative effect of the Federal provisions enacted in accordance with the unqualified intent of the Congress.

The force and effect of the Federal statute, (Title 12 U. S. C. Sec. 66) in this respect has been recognized by the Supreme Court of Illinois in the leading case of *Mortimer et al.* v. *Potter*, 213 Ill. 178; 72 N. E. 817, where it appeared that Charles Kavanagh, the stockholder of a national bank, died, and the assets of his estate had been delivered to trustees under a trust created under the will, and the decedent's estate had been settled more than twenty years before the assessment was levied. The stock apparently remained of record in the name of decedent and checks for dividends were made payable to Charles Kavanagh and were endorsed by the widow as co-trustee under the trust. The receiver sued the surviving trustee, as trustee, (the widow having died), the distributees receiving the assets of the estate, and also the surviving trustee personally. The court affirmed the judgment of the lower court, rendering judgment to take effect primarily against the surviving trustee, secondarily against the legatees and distributees, and ultimately against the trustee personally, for the assets of the estate to the extent necessary to meet the assessment. The defense raised the point, *inter alia*, that the claim was barred because not presented within two years as required by state law. In overruling this contention and holding

that the state statute was ineffective against the Federal statutes, the court said (p. 818 Reporter citation):

> "It is next insisted by appellants that, even though this claim is valid against the estate, yet it cannot be enforced because it is barred by the statute of limitations, not having been presented for probate against the estate of Kavanagh within two years after the granting of testamentary letters. *The claim against his estate is not by virtue of the laws of this state, but under the provisions of the foregoing federal statute. In addition to this, at the time the administration of his estate was closed the claim had not accrued. The liability arose more than 20 years after the expiration of the 2 years within which claims could have been filed against it in the probate court. But the remedy under the act of Congress is applicable, and the estate is liable under its provisions, so long as the assets can be reached.*
>
> "The case of Zimmerman v. Carpenter (C. C.), 84 Fed. 750, involved this same question. It was there claimed that a plea of the statute of limitations, based upon the statute of the state of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate, barred the claim there presented. In considering the question the court said: 'Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of the deceased, to be represented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever barred by the statute, involves a total misconception of the object, meaning, and effect of sections 5151 and 5152 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3465). Congress provided by these sections that the estate of the testator in the hands of an executor should be liable in like manner and to the same extent as the testator would be if living and competent to act and hold the stock. By the language of section 5152 the death of the testatory does not in any way affect the liability of the estate, except, if no liability on the stock arises until after the estate is fully distributed, then

there would be no estate to be charged.' Under the facts in this case the liability attached while the assets were in the hands of the trustee, and therefore came directly under the provisions of section 5152, supra." (Italics inserted.)

This case was recently cited with approval by the Supreme Court of Illinois in *Kingston* v. *Old National Bank of Centralia* (1934), 359 Ill. 192; 194 N. E. 213, 219.

Thus it is clear that the Supreme Court of Illinois has recognized the paramount effect of the Federal statute (Sec. 66, Title 12, U. S. C.—Appendix p. 31) and that where the assessment liability does not accrue or become absolute until the time prescribed for filing claims against the estates of deceased shareholders has expired according to the provisions of the state non-claim statutes, the enforcement of the assessment liability is not barred by the failure to file the claim within the period required by the non-claim statute.

Further, in support of the general principle (regardless of whether the claim is based upon a federal statute) that where the liability is not only contingent, but is also, from its very nature, incapable of being presented and allowed in the pending probate proceedings, due to the fact that the liability may never culminate into absolute liability, such contingent and uncertain claims can not reasonably be considered to be within the scope and purpose of non-claim statutes and therefore are not necessarily barred from enforcement by failure to file within the period required by the non-claim statute, see:

Hantzch v. *Massolt*, 63 N. W. 1069-1072, 62 Minn. 361;
Miller & Lux v. *Katz*, 102 Pac. 946, 947;
Springhorn v. *Dirks*, 231 Pac. 912, 915;
Zimmerman v. *Carpenter*, 84 Fed. 747, 750-751;
Allen, Commissioner of Banks v. *Hanover Trust Co.*, 142 N. E. 105, 106, 107;
Tierney v. *Shakespeare*, 284 Pac. 1019, 1020;
Baird v. *McMillan*, 205 N. W. 682, 683, 684, 41 A. L. R. 177;
Johnson v. *Libby*, 88 Atl. 647, 650, 651.

C.

The enforcement of the liability imposed by Section 66, Title 12, U. S. C., may not be thwarted or impeded by state law which discriminates against or is inadequate for the just and convenient collection of the amount of the assessment. To require the petitioner to collect his claim in accordance with the laws of Illinois governing claims against estates of deceased persons, would compel him to proceed in a manner inadequate for the just and convenient enforcement of a liability specifically imposed by the Federal Statute, (Sec. 66, Title 12, U. S. C.), thus discriminating against and impeding the collection of a liability imposed by the national authority.

The decisions of the Supreme Court of Illinois are to the effect that the Non-Claim Statute, (Ch. 3, Par. 71, Sec. 70, Ill. Rev. Statutes, 1935; Sec. 70, Ill. Adm. Act), (Appendix, p. 31) is not a general statute of limitations, but is a specific act adopted for the particular purpose of facilitating the early settlement of estates, and when a contingent claim against a deceased person does not ripen into an absolute liability until the expiration of the period allowed by law for presenting claims against an estate, the creditor is not permitted to participate in the distribution of the estate previously inventoried or accounted for by the executor or administrator. He must satisfy his debt out of property subsequently discovered or inventoried.

Such a claimant may, however, maintain a bill in equity against the heirs, devisees or legatees to reach the property of the estate received by them.

See *Union Trust Co.* v. *Shoemaker*, 258 Ill. 564; 101 N. E. 1050; *Chicago Title & Trust Co.* v. *Corp. of Fine Arts Bldg.*, 288 Ill. 142; 123 N. E. 300; *Pearson et al.* v. *McBean et al.*, 231 Ill. 536; 83 N. E. 173; *Ryan* v. *Jones*, 15 Ill. 1; *Stone* v. *Clarke*, 40 Ill. 411; *Rassieur* v. *Jenkins*, 170 Ill. 503; 48 N. E. 976; *Morse* v. *Pacific Ry. Co.*, 191 Ill. 356; 61 N. E. 104; *Beebe* v. *Kirkpatrick*, 321 Ill. 612; 152 N. E. 539; *Durflinger*

v. *Arnold*, 329 Ill. 93; 160 N. E. 172; *Foreman State Trust & Sav. Bk.* v. *Tauber*, 348 Ill. 280; 180 N. E. 827.

Thus it appears that even though the executors or administrators have in their hands undistributed inventoried assets of the estate, *a contingent claim arising under state law* which does not become absolute within the period prescribed for filing claims against estates of deceased persons is barred from participation in the distribution of the inventoried assets, even though there may remain in the hands of the executors or administrators, undistributed inventoried assets of value sufficient to pay such a claim. The claimant in such cases, in the absence of the existence of subsequent inventoried assets of the estate, must remain passive and inactive until a distribution is ordered and made to all creditors proving claims and to the heirs and distributees or legatees, or so much thereof as would be sufficient to satisfy his claim, and then bring a bill in equity against the heirs and legatees or distributees for the purpose of subjecting the property of the estate received by them in payment thereof.

The question of the applicability of Section 70, Ch. 3 of the Revised Statutes of Illinois, (Appendix p. 31), in connection with a claim such as the claim of the petitioner in this case was directly before the District Court of the United States for the Eastern District of Illinois in the case of *J. R. Drake, Receiver of the First National Bank of Monticello, Illinois*, v. *Annie Dilatush, Executrix of the Estate of Frank V. Dilatush, Deceased supra*, the opinion of District Judge Walter C. Lindley being printed in full in the Appendix at pages 44-45. There it was contended on behalf of the estate that, inasmuch as the plaintiff's claim for stock assessment did not arise until after the period for filing claims had expired under Section 70, Ch. 3 of the Revised Statutes of Illinois, (Appendix p. 31), the Receiver could not share in the undistributed inventoried assets of the estate for the purpose of satisfying his claim, and the decision of this court in *Forrest* v. *Jack, supra*, was

relied upon as authority for that position. In discussing the effect of the Non-Claim Statute of Illinois upon a claim for stock assessment arising under the Federal law, the court said (Appendix pp. 51-52):

> "Defendant earnestly insists that the plaintiff's cause of action is barred by Section 70 Chapter 3 of the Revised Statutes of the State of Illinois which bars claims after one year from the date of the probate of the will, except as to subsequently inventoried property and relies upon the case of *Forrest* v. *Jack, et al*, 294 U. S. 158, recently decided by the Supreme Court. Decided the same day was *Seabury* v. *Green*, 294 U. S. 165. *Upon careful analysis, these cases do not support defendant's contention.* The holding in the case of *Forrest* v. *Jack, supra*, was to the effect that the estate is not liable for an assessment made after final distribution of the deceased's property and after the cessation of existence of such estate. The court held that the liability for the assessment continues unimpaired until valid assignment of the shares is made by final distribution or by other transfer and that the liability 'cannot be thwarted or impeded by state law.' In the latter case the court said:
>
> > 'For the want of capacity the minors are not subject to the assessment. The shares, though in form transferred to their names on the books of the bank, actually continued to be and still are a part of the testator's estate. *Early* v. *Richardson*, 280 U. S. 496, 499. Cf. *McNair* v. *Darragh*, 31 F. (2d) 906. And the estate continued to be liable as a stockholder under Section 66. The liability was not by the Congress intended to be limited to property actually in the hands of the personal representative when the bank became insolvent or when the comptroller's assessment was made. Section 64 imposes liability upon the stockholder while living. Section 66 lays the same burden upon his estate. The purpose of the latter is to make the estate liable for the comptroller's assessment made after the stockholder's death just as it is liable for decedent's indebtedness arising before he died. . . . As suggested in *Forrest* v. *Jack, supra*, the enforcement of liability imposed by

Section 66 may not be thwarted or impeded by state law.'

"This is in accord with the public policy of Illinois, for in *Mortimer et al* v. *Potter, Receiver,* 213 Ill. 189, even though the liability of a national bank stockholder did not arise until long after the stockholder's death and long after the expiration of the time for filing claims in probate, during all of which period, however, the estate had been administered by a trustee for the benefit of the widow, it was held that the assets of the estate, were impressed with the liability. *The statute fixing the time for filing claims against the estate is not a general law of limitation but* a specific act for facilitating early settlements of estates. *Union Trust Co.* v. *Shumaker,* 258 Ill. 568. The court held there that where a claim against a deceased person has remained contingent during the whole period allowed by law for presenting claims against the estate and does not ripen into absolute liability until the estate has been distributed, the claimant may maintain a bill in equity against such legatees to reach the property of the estate received by them. This decision goes much further than it is necessary to go in the present case. In *Sanders* v. *Merchants State Bank,* 349 Ill. 547 the claim was not exhibited within the year. It was contingent and had not ripened into maturity, and the court held that the suit was properly brought to reach the funds of the estate *and that the remedy provided by the federal statute to recover an assessment may be enforced as long as the assets can be reached regardless of the expiration of the statutory period for filing claims. Mortimer* v. *Potter,* 213 Ill. 178; *First Natl. Bank of Hinckley* v. *Clark,* 275 Ill. App. 282; *Dairyman's State Bank* v. *Durham,* 271 Ill. App. 249. The statute of Illinois forbids devises in fraud of creditors. (Cahill's Ill. Statutes, Chap. 59, Secs. 10, 11, 12), and equity affords relief against such action. *Durflinger* v. *Arnold,* 329 Ill. 93 and cases there cited." (Italics inserted)

This decision clearly points out the distinction existing where the estate has been finally closed and extinguished under state law, as was the case in *Forrest* v. *Jack, supra,* where this court said at page 163:

> "There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate."

As previously indicated (*supra*, pp. 10-11) the facts in the instant case are clearly distinguishable from *Forrest* v. *Jack*, *supra*, as it appears from the stipulation of fact, (R. 9, 10, 11 and 26), that the estate is not closed and there are undistributed inventoried assets in the hands of the executors of sufficient value to satisfy petitioner's claims. In *Matteson* v. *Dent*, *supra*, where there had been a complete distribution, and in *Seabury* v. *Green*, *supra*, where there was an attempted complete distribution, it was pointed out by this court that under the law of the states where the cases arose complete distribution did not *extinguish the estate* and contingent claims arising thereafter could be satisfied from the distributed assets to the extent they had been received by the heirs.

As long as the assets remain in the hands of the executors awaiting distribution, the situation is tantamount to the decedent herself owning them as a living person and consequently liable for the assessment. Therefore, in view of the foregoing, it is respectfully submitted that the provisions of the Illinois law, limiting and restricting the enforcement of contingent claims that become absolute after the time prescribed for filing claims against an estate has expired, are inconsistent with, inadequate for, and discriminatory against, the just and convenient enforcement of the assessment liability imposed by the national authority.

From the standpoint of enforcing the assessment liability imposed by the Federal Statute, it is obvious that the problem created by the expiration of the period for filing claims under the non-claim statute is not adequately or reasonably solved by the fact that under the State law in such case the receiver may possibly be able to satisfy the assessment

claim out of property subsequently discovered and inventoried or, in the alternative, may proceed against the heirs, devisees, legatees, or distributees receiving the inventoried property from the estate, for the reasons that:

(a) The situation may be, as in the instant case, that no additional assets exist, and therefore can not be inventoried as a source of future payment of the assessment claim, in which event the previously inventoried but undistributed assets already on hand would be free from the assessment claim, notwithstanding the purpose of the Federal Statute is to substitute the undistributed assets of the estate on hand in place of the deceased stockholder.

(b) To require the receiver to stand inactive, awaiting the pleasure or whim of the executor or administrator of the estate with reference to the distribution of the *untouchable* inventoried assets, and to thus defer enforcement of the assessment liability until after the assets have been distributed to the beneficiaries under the estate would obviously defeat the purpose of the Federal Statute which was designed to render relief to the depositors and creditors of the bank as quickly as possibly by a speedy winding up of its affairs including the enforcement of assessment liability. It is entirely possible that the delay, or the failure, of the executor or administrator of the estate of the decedent to make distribution among the beneficiaries and thus enable the receiver to proceed against said beneficiaries, would prolong the liquidation of the estate beyond the normal period of receivership liquidation and in any event would unnecessarily increase the expense of liquidation by deferring and continuing, for the elapsed period of delay, the liquidation of the receivership. It is manifestly unreasonable, and defeatist in effect, to permit the State law to compel the receiver to fall back upon the remedy of recourse against the distributees of the estate, waiting in the meantime for such distribution to be made, when the undistributed assets are already on hand, stand in place of the decedent, and are capable of being subjected immediately to the enforcement of the assessment. A State statute

would thus be given paramount effect over the Federal Statute.

As far back as its decision in *Kennedy* v. *Gibson*, 8 Wall. 498, this Honorable Court has recognized and established that the plain purpose of the National Bank Act was that the affairs of an insolvent national bank in the hands of a Receiver appointed by the Comptroller of the Currency should be expeditiously and speedily wound up. At page 505 of that opinion, it was said:

> "A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it and it was the obvious policy and purpose of Congress to give it."

To the same effect is the recent expression of this court in the case of *Korbly* v. *Springfield Institution for Savings*, 245 U. S. 330, where at page 333 it was said:

> "From the earliest days of the administration of the National Banking Act to this case attempts have been made in many forms to give to it a technical construction which would so restrict the powers of the Comptroller as to greatly delay and impede the settlement of the affairs of insolvent banks. But this court has uniformly declined to narrow the act by construction, and has placed a liberal interpretation upon its provisions to promote its plain purpose of expeditiously and justly winding up the affairs and paying the debts of such unfortunate institutions. Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463; Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; United States v. Knox, 102 U. S. 422, 26 L. ed. 216; Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; and Bowden v. Johnson (Adams v. Johnson), 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246."

CONCLUSION.

We believe, in view of the foregoing, that the judgment of the court below should be reversed, and the Receiver's claim allowed against the undistributed inventoried assets of the estate in the hands of the executors.

Respectfully submitted,

OTIS F. GLEN,
GEORGE P. BARSE,
J. H. BREWER, JR.,
Attorneys for Petitioner.

R. G. REAL,
HAROLD E. BAILY,
Of Counsel.

APPENDIX.

Jurisdiction of Appellate and Supreme Courts.

Chapter 110, Sec. 75 (2), Illinois State Bar Statutes, 1935, (Cahill's R. S. of Ill. 1935 Ed., p. 2448):

"Appeals shall be taken * * * in all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions:

"(1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal.

"(2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: *Provided, however,* * * * in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). * * *."

Statutes Involved.

Section 64, Title 12, U. S. C. A., provides in part as follows:

"The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value

thereof, in addition to the amount invested in such stock * * *."

Section 66, Title 12, U. S. C. A., provides:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living and competent to act and hold the stock in his own name."

Section 70 of the Illinois Administration Act (Ch. 3, Par. 71, Section 70, Illinois Revised Statutes, 1935), provides in part as follows:

"All demands against the estate of any testator or intestate shall be divided into classes in manner following, to wit:

"First. Funeral expenses and necessary costs of administration.

* * * *

"Sixth. All other debts and demands of whatever kind without regard to quality or dignity, which shall be exhibited to the court *within one year from granting of letters as aforesaid.* (Italics inserted.)

"All claims and demands of whatever class *not* exhibited to the court *within one year from the granting of letters as aforesaid shall be forever barred as to property and estate of the deceased which has been inventoried or accounted* for by the executor or administrator: and if the executor or administrator shall thereafter file any inventory listing other estate not previously inventoried or accounted for, and shall cause notice to be published in the manner provided by Section 60 of this act, or give such other notice as the court may direct, of a day fixed upon, which shall not be less than three months after the date of such first publication, for the filing and exhibiting of further claims against said decedent, all claims not exhibited to the court prior to the date so fixed shall be forever barred as to the property and estate listed in such inventory,

and the amount remaining due on all claims exhibited to the court on or prior to the day so fixed upon as aforesaid, including those filed within one year from the granting of letters shall be paid pro rata out of such subsequently inventoried estate, saving, however, to infants, persons of unsound mind and persons in the employment of the United States or of this State and residing outside of the United States, the term of one year after their respective disabilities are removed to exhibit their claims. (As amended by Act approved June 30, 1933.)". (Italics inserted.)

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOT THE EASTERN DISTRICT OF ILLINOIS.

WILLIAM M. BELOW, Receiver of The First National Bank of Ridgefarm, Ridgefarm, Illinois,	
v.	In Equity No. 811-D.
FIRST NATIONAL BANK OF DANVILLE, ILLINOIS, Administrator With the Will Annexed of the Last will and Testament of Pleasant Mills, Deceased.	

FINDINGS AND CONCLUSIONS.

This is a suit in equity by the receiver of a national bank to impress the assets of the estate of a deceased stockholder with liability for an assessment upon such stock. The estate has not been completely administered. The proceedings in the probate court are still pending and substantial assets remain in the hands of the administrator. The stock was issued to the deceased some years before his death and never transferred. In the absence of proof of such transfer, the estate remains liable. Consequently, the case is governed by Seabury v. Green, 294 U. S. 165 and Forrest v. Jack, 294 U. S. 158, and plaintiff is entitled to the relief prayed.

Nor does the denial of the claim in the probate court, because of the elapse of a year before filing same, bar this action. As said by the Supreme Court in Seabury v. Green, *supra*, the enforcement of liability imposed by the federal statutes may not be thwarted or impeded by the state law.

See also Zimmerman v. Carpenter, 84 Fed. 747 (CCAB); Mortimer v. Potter, 213 Ill. 178, and authorities cited in 41 A.L.R. 181.

Consequently, there will be a decree impressing the assets of the estate with liability for the demand.

I do not agree, however, that this debt should have preference over other claims against the estate. The federal statute does not purport to give any priority to National bank stock assessments over other creditors. The decree should be framed, therefore, so that other general creditors and plaintiff shall share upon the same basis in proportion to their respective demands in the assets of the estate considered as a whole. Proper decree may be sumbitted.

The foregoing is herewith adopted as my findings of fact and conclusions of law, pursuant to Equity Rule 70½.

Entered this 15th day of July, A. D. 1936.

(Signed) WALTER C. LINDLEY,
Judge.

At a stated term of the District Court of the United States in and for the Eastern District of Illinois, held in the Court Room thereof in the Federal Building in the City of Danville, and State of Illinois this 8th day of July, A. D. 1936.

Present:

HONORABLE WALTER C. LINDLEY,
District Judge.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOT THE EASTERN DISTRICT OF ILLINOIS.

WILLIAM M. BELOW, Receiver of The First National Bank of Ridgefarm, Ridgefarm, Illinois, *Plaintiff*, v. FIRST NATIONAL BANK OF DANVILLE, ILLINOIS, Administrator With the Will Annexed of the Last Will and Testament of Pleasant Mills, Deceased, *Defendant*.	In Equity No. 811-D.

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The court having heretofore entered its findings of fact and conclusions of law and the defendant having filed objections thereto,

NOW, THEREFORE, upon due consideration the court enters its amended findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

I.

That Pleasant Mills late of the County of Vermilion and State of Illinois was during his lifetime the owner of seven (7) shares of the capital stock of First National Bank of Ridgefarm, Ridgefarm, Illinois evidenced by stock certificate number 32 issued by said Bank.

II.

That the said Pleasant Mills died testate on the 4th day of April, A. D. 1932 owning seven (7) shares of the capital stock of First National Bank of Ridgefarm, Ridgefarm, Illinois, and that First National Bank of Danville, Illinois is now the duly appointed, qualified and acting administrator with the will annexed of the last will and testament of Pleasant Mills, deceased.

III.

That William M. Below was appointed Receiver of said First National Bank of Ridgefarm, Ridgefarm, Illinois, by the order of the Comptroller of the Currency of the United States of America pursuant to the statutes of the United States in such cases made and provided on the 10th day of October, A. D. 1933 and that he thereafter qualified as such receiver and has continued since that date to act and is now acting as the duly qualified and constituted receiver of First National Bank of Ridgefarm, Ridgefarm, Illinois.

IV.

That the Comptroller of the Currency of the United States of America pursuant to the statutes of the United States of America in such case made and provided, levied and made an assessment and requisition upon the shareholders of First National Bank of Ridgefarm, Ridgefarm, Illinois, for $50,000.00 or $100 per share on the capital stock of said Bank to be paid by said shareholders on or before the 13th day of February, A. D. 1934 with interest thereon at the legal rate of the State of Illinois from that date forward to the date of payment of said liability, on the 4th day of January, A. D. 1934.

V.

That demand was made upon the personal representative of Pleasant Mills, deceased, for the payment of the sum of

Seven Hundred Dollars, ($700.) together with interest on said sum from and after the 13th day of February A. D. 1934 at the legal rate of the State of Illinois to the date of payment of said sum pursuant to the assessment levied and made by the Comptroller of the Currency of the United States of America above mentioned, being the assessment upon the seven (7) shares of the capital stock of First National Bank of Ridgefarm, Ridgefarm, Illinois owned by the said Pleasant Mills, deceased, at the time of his death.

VI.

That prior to the time of the filing of the complaint in this case and on October 6, 1933, pursuant to an order of the Probate Court of Vermilion County, Illinois, distribution was made to creditors of the estate represented by defendant, whose claims were allowed by said Probate Court on said date as follows:

To F. A. Cannady, payment on claim	$1,222.80
To Nellie Moffett, payment on claim	2.31
To First National Bank, Westville, Illinois, payment on claim	51.75
To Nellie Baum, payment on claim	711.09
To First National Bank of Ridgefarm, Ridgefarm, Illinois payment on claim	22.23
To First National Bank of Ridgefarm, Ridgefarm, Illinois payment on claim	984.33
To Third class claims in full	17.00

VII.

That prior to the time of filing the complaint in this case and on February 2, 1934, the plaintiff filed his claim of Seven Hundred Dollars ($700.) based on the assessment by the Comptroller of the Currency of the United States of America made on seven (7) shares of the capital stock of the First National Bank of Ridgefarm, Ridgefarm, Illinois, held and owned by Pleasant Mills, deceased, at the time of his death in the matter of the estate of Pleasant Mills, de-

ceased; that objection was made to said claim so filed by the plaintiff herein by the defendant herein as administrator on the ground that said claim was not exhibited to the Probate Court of Vermilion County, Illinois, within one year next following the issuance of letters testamentary as provided by the statute of the State of Illinois relative to administration upon estates and that the plaintiff's claim was dismissed by the said Probate Court of Vermilion County, Illinois, on April 16, 1934, on the ground urged by defendant herein and that the plaintiff herein prayed an appeal from said order of dismissal to the Circuit Court of Vermilion County, Illinois, and that afterward the plaintiff herein presented a motion to the Probate Court of Vermilion County, Illinois, praying that the judgment of said Court dismissing plaintiff's claim above herein referred to be vacated, which said motion to vacate was denied by the Probate Court of Vermilion County, Illinois, on June 29, 1934, and that the plaintiff herein prayed an appeal from the judgment of said Probate Court denying said motion to vacate to the Circuit Court of Vermilion County, Illinois, and that the plaintiff herein failed to perfect either of the appeals hereinbefore referred to as being prayed to him.

VIII.

That at the time of the filing of the complaint in this case, the defendant as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, had in its possession the sum of Three Thousand Five Hundred Fifty-four Dollars and fifty-nine cents ($3,554.59).

IX.

That at the time of the hearing on this case, the estate of Pleasant Mills, deceased, was not completely administered and that the proceedings for the administration of the same are still pending in the Probate Court of Vermilion County, Illinois, and that substantial assets of said

estate remain in the hands of the administrator, defendant herein.

X.

That the defendant as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, has refused to pay the assessment levied by the Comptroller of the Currency of the United States upon the seven (7) shares of the capital stock of First National Bank of Ridgefarm, Ridgefarm, Illinois, owned by Pleasant Mills, deceased at the time of his death or the interest upon the same according to the assessment or any part thereof.

CONCLUSIONS OF LAW.

Whereupon the Court concluded as a matter of law:

I.

That the assets of the estate of Pleasant Mills, deceased, now in the hands of the defendant, First National Bank of Danville, Illinois, administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, are subject to a lien in favor of the plaintiff, William M. Below, as receiver of the First National Bank of Ridgefarm, Ridgefarm, Illinois, by reason of the assessment made and levied by the Comptroller of the Currency of the United States of America upon the capital stock and shareholders of said First National Bank of Ridgefarm, Ridgefarm, Illinois, in the amount of Seven Hundred Dollars ($700.) together with interest at the legal rate of the State of Illinois on said sum of Seven Hundred Dollars ($700.) from the 13th day of February A. D. 1934 forward to the date of payment of said assessment by reason of the fact that the said Pleasant Mills, deceased, died the owner of seven (7) shares of the capital stock of said First National Bank of Ridgefarm, Ridgefarm, Illinois.

II.

That the lien heretofore herein impressed upon the assets of the estate of Pleasant Mills, deceased, in the hands of the defendant First National Bank of Danville, Illinois, as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, in favor of the plaintiff, William M. Below, as receiver of the First National Bank of Ridgefarm, Ridgefarm, Illinois, may be discharged only by payment by the defendant, First National Bank of Danville, Illinois, administrator with the will annexed of the last will and testament of Pleasant Mills, deceased, to William M. Below as receiver of the First National Bank of Ridgefarm, Ridgefarm, Illinois, of a sum out of the assets of the estate of Pleasant Mills, deceased, which sum shall be in equal proportion to the sum received by all sixth class or general creditors having claims against the estate of Pleasant Mills, deceased, allowed against said estate by the Probate Court of Vermilion County, pursuant to the statutes of the State of Illinois in such case made and provided considering the full value of all claims including the lien herein decreed in favor of the plaintiff at the date upon which final distribution to and payment of said sixth class or general claims and lien herein decreed is made by the defendant from the funds in its hands as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased,

Let a decree be entered accordingly.

(Signed) WALTER C. LINDLEY,
United States District Judge.

Dated July 31, 1936.

At a stated term of the District Court of the United States in and for the Eastern District of Illinois held in the Court Room thereof in the Federal Building in the City of Danville, and State of Illinois this 8th day of July A. D. 1936.

Present:

HONORABLE WALTER C. LINDLEY,
District Judge.

WILLIAM M. BELOW, Receiver of The First National Bank of Ridgefarm, Ridgefarm, Illinois, *Plaintiff*,

v.

FIRST NATIONAL BANK OF DANVILLE, ILLINOIS, Administrator With the Will Annexed of the Last will and Testament of Pleasant Mills, Deceased, *Defendant*.

In Equity No. 811-D.

DECREE.

The above entitled cause came on regularly for trial in the above entitled court, Honorable Walter C. Lindley, judge of said Court, presiding, on the 8th day of July A. D. 1936, the plaintiff, William M. Below, receiver of the First National Bank of Ridgefarm, Ridgefarm, Illinois, being represented by his attorney, Riley McLain, and the defendant, First National Bank of Danville, Illinois, Administrator with the Will annexed of the Last Will and Testament of Pleasant Mills, deceased, appearing and being represented by its attorneys, Alfred A. Johnson and John Clark of the firm of Hutton & Clark, whereupon evidence both oral and documentary on behalf of the parties was offered and received and the Court having duly considered the evidence and arguments of counsel and being fully advised in the premises entered a decree on July 23, 1936, and now enters this decree which is in accord with the decree heretofore entered herein on July 23, 1936, but is entered because of the modification of findings of fact and conclusions of law entered simultaneous herewith.

IT IS NOW THEREFORE ORDERED, adjudged and decreed that the assets of the estate of Pleasant Mills, de-

ceased, remaining in the hands of the defendant be and the same are hereby impressed with a lien in favor of plaintiff in the amount of Seven Hundred Dollars ($700.00) and interest thereon at the legal rate of the State of Illinois on said sum of Seven Hundred Dollars ($700.) from the 13th day of February, 1934, forward to the date of payment of said sum.

It is further ordered, adjudged and decreed that the lien hereby impressed shall be discharged by the payment by defendant to plaintiff of a sum out of the assets of the estate of Pleasant Mills, deceased, which sum shall be in equal proportion to the sum received by all sixth class or general creditors having claims against the estate of Pleasant Mills, deceased, allowed against said estate by the Probate Court of Vermilion County, Illinois, considering the full value of said claims including the lien hereby impressed, at the date upon which final distribution to and payment of said sixth class or general claims and the lien hereby impressed is made by the defendant from the funds in its hands as administrator with the will annexed of the last will and testament of Pleasant Mills, deceased.

ENTER:

(Signed) WALTER C. LINDLEY,
District Judge.

Dated July 31, 1936.

DISTRICT COURT OF THE UNITED STATES OF AMERICA

EASTERN DISTRICT OF ILLINOIS

I, D. H. REED, Clerk of the District Court of the United States for the Eastern District of Illinois, and keeper of the records and seals thereof, do hereby certify the foregoing to be a true copy of the original Findings and Conclusions filed and entered July 15th 1936; Amended Findings of Fact and Conclusions of Law filed and entered on July 31st 1936; and Decree entered on July 31st, 1936 in the matter of WILLIAM M. BELOW, RECEIVER OF THE FIRST NATIONAL BANK OF RIDGEFARM, RIDGEFARM, ILLINOIS vs. FIRST NATIONAL BANK OF DANVILLE, ILLINOIS, ADMINISTRATOR WITH THE WILL ANNEXED OF THE LAST WILL AND TESTAMENT OF PLEASANT MILLS, DECEASED, IN EQUITY NO. 811-D, as fully as the same appears from the original Findings; Amended Findings and Decree now on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at my office in the City of Danville, in the District aforesaid, this 1st day of September A. D. 1936.

D. H. REED,
Clerk.

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE EASTERN DISTRICT OF ILLINOIS.

J. R. DRAKE, Receiver of the First National Bank of Monticello, Illinois, Plaintiff,

v.

ANNIE DILATUSH, Executrix of the Estate of Frank V. Dilatush, Deceased, *Defendant.*

In Equity No. 730-D.

LINDLEY, *District Judge:*

Plaintiff brought this suit in equity against Annie Dilatush, and Annie Dilatush, as Executrix of the Estate of Frank V. Dilatush, Deceased. The Court later dismissed the motion as to Annie Dilatush. The cause is at issue upon an amended and supplemental bill of complaint and answer thereto by defendant as executrix.

J. R. Drake is the duly designated, qualified and acting Receiver of The First National Bank of Monticello, by appointment of the Comptroller of the Currency, on January 12, 1934. He succeeded himself as conservator, to which latter office he had been appointed on March 31, 1933.

Frank V. Dilatush, a stockholder and director of the bank, died testate April 27, 1932, owning 45 shares of the capital stock of the bank of the par value of $4,500.00. He left surviving as his sole heir at law, his daughter Annie Dilatush. His will was admitted to probate and letters testamentary were issued on May 3, 1932, to Annie Dilatush, as executrix under his last will and testament. She is still acting as such; the estate has not been closed, but is being ad-

ministered in the County Court of Piatt County, Illinois, which has probate jurisdiction. The appraisement of the testator's property showed personal property on the farms of approximately $10,000.00 in value. Defendant inventoried the real estate consisting of three tracts, 304.82 acres of land in Champaign County, 240 acres in Piatt County and 45.26 acres in Piatt County. The last two tracts are free of incumbrances. The first is incumbered by a mortgage securing $20,000.00, held by The Equitable Life Assurance Society. Under the will, the shares in the bank and all other property passed to the defendant as executrix.

In the administration of the estate, the defendant fixed July 5, 1932, as the date upon which claims could be filed against the estate, as provided by the statute of the state of Illinois, and the time for filing claims in court, under the statute of Illinois, expired one year from the granting of the letters of executorship, long prior to any assessment by the comptroller. The conservator, while in charge, performed some banking functions. Claims have been filed and allowed against the estate, aggregating approximately $18,000.00 and there is pending a disputed claim for $12,063.00.

On the 2nd day of April, 1934, the Comptroller of the Currency of the United States made an assesment upon all shares, of 100 per cent of the par value thereof, including the shares held by defendant as executrix, and on April 9, 1934, written demand was made upon defendant for the payment of such assessment. The bank was closed March 4, 1933, under proclamation of the governor of Illinois. It never reopened, but remained closed under such proclamation, and has been in process of liquidation since the appointment of the receiver.

Defendant contends that there is no proper description of plaintiff in the bill of complaint. The proper name is J. R. Drake, Receiver of The First National Bank of Monticello, Illinois. Plaintiff omitted the word "Illinois," but by its motion now presented seeks leave to amend by adding the word "Illinois" to plaintiff's title. This amendment the

court allows in furtherance of justice. No harm results to defendant.

Defendant insists that plaintiff's remedy is at law; that such legal remedy is adequate and that equity has no jurisdiction. The assessment was made in pursuance of the statutes of the United States governing national banking associations. Title 12, U. S. Code, Sec. 64, provides that "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof, in addition to the amount invested in such stock * * *." Section 66 provides that "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name." The suit is grounded upon section 66, and seeks, therefore, no personal liability against defendant for this, the statute expressly denies. Rather plaintiff seeks to establish a liability against "the estate and funds in the hands" of the executrix, so that such property, held in her fiduciary capacity, shall be subjected to the assessment to the same extent as the testator himself would have been liable if living. In other words, the plaintiff seeks to establish a liability of which he cannot obtain recognition in the probate court and to subject property in the hands of a fiduciary of a deceased testator to a statutory liability. It would seem obvious that such remedy lies only in a court of equity. Courts of equity have always opened their doors to prayers for relief, which seek, not to establish liabilities at law, for tort, in assumpsit or otherwise, but seek to reach property beyond the reach of a court of law and isolated in the hands of a trustee, receiver, guardian or other fiduciary. The enforcement of trusts as a matter of equity and jurisdiction

is taken of suits against executors and administrators, as upon a trust to be executed. Kendall v. Creighton, 23 How. 90, 16 L. ed. 419; Corker v. Jones, 110 U. S. 317. Even if there were a remedy at law provided by state statute, that fact, the Supreme Court has said, will not deprive the federal court of jurisdiction to enforce a lien by bill in equity, the establishment of the lien being essentially an equitable proceeding. Sheffield Furnace Co. v. Witherow, 149 U. S. 574; De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co., 46 Fed. 829, reversed on other grounds, 57 Fed. 111.

Probate estates were originally solely within the jurisdiction of courts of equity and transfer thereof to probate courts is a matter of statute. Thus Pomeroy's Equity Jurisprudence, Vol. 1, 4th Ed., p. 191, says:

> "The relation subsisting between executors and administrators on the one hand, and legatees, distributees, and creditors on the other, has so many of the features and incidents of an express active trust, that it has been completely embraced within the equitable jurisdiction in England, and also in the United States, where statutes have not interfered to take away or to abridge the jurisdiction."

I conclude, therefore, that plaintiff's cause of action, being one not to establish a personal liability but to have established a liability against property in the hands of the fiduciaries, cannot adequately be given fruition in a suit at law but is clearly within equity jurisdiction.

Defendant's answer sets up that heretofore in a suit in the state court plaintiff by way of cross-bill sought to enforce the same liability here asserted. This fact is relied upon as ground for abatement. But the record is that such prayer for relief was voluntarily withdrawn by plaintiff. There was, therefore, no adjudication and nothing to furnish ground for abatement.

Defendant contends that the liability upon the assessment is not a contractual one but a penalty; that the bank

conservation act, having been adopted subsequent to the attaching of ownership of testator's shares, is, in effect, retroactive and *ex post facto* in character, and, therefore, invalid; that under the terms, subsequent to March 3, 1933, the management of the bank was taken from the stockholder, the directors and officers and put in the hands of a conservator under order and instructions from the Comptroller and operated by him in the restricted manner possible under the act. It is insisted that the Comptroller's only legal power was to declare the bank insolvent, appoint a receiver and liquidate the institution. It is said that by ousting the bank's management, the Comptroller and conservator have estopped themselves to assert the liability of the stockholder.

True it is that where the performance of contract lawful in its execution is made unlawful by any subsequent event, the contract is dissolved, and that impossibility of performance created by acts of law operates as a discharge. But, admitting for the moment, only for the purpose of disposal of this question, that the conservation act and its operation were illegal or unconstitutional, that fact does not relieve the stockholder of its statutory liability. The reasoning of the cases relied upon by defendant is not applicable to the present situation.

In the case of Barbour, *et al.* v. Thomas, 7 F. Supp. 271, it appeared that the First National Bank of Detroit was closed as a result of the governor's proclamation and it was said that stockholders should not be liable for shrinkage of assets because of the allegedly illegal holidays or the acts of the conservator. The court held, however, that the statutory liability of stockholders is immediately available for creditors when there are valid debts made by the bank and the Comptroller is satisfied that it is necessary to make the levy to satisfy the debts, saying:

> "It would be a novel proposition if a bank stockholder could defeat the creditors by showing the assets were dissipated through the acts of the officers ap-

pointed to administer them. Such a principle would make it necessary for the courts to review every act of such officers and make the cost of collecting the assessment greater than any amount that could be collected. The statute makes no provision for the relief of bank stockholders on account of dissipation of assets * * * Therefore it is immaterial whether the bank was solvent on the dates of the state and national holidays and at the time of the appointment of a conservator, nor is it material whether the sale of a part of the assets by the conservator, which was approved by a court of competent jurisdiction, resulted in the insolvency of the bank. The sale did not create the debts and consequently could not release the liability of the bank stockholders. The allegations in these respects and the proof tendered in support thereof were immaterial to the main issues, did not, and could not, constitute a defense at law or in equity. Day v. United States, 245 U. S. 159, 38 S. Ct. 57, 62 L. Ed. 219."

The Court said further:

"This court deems it unnecessary to inquire into the legality of the holidays. Northern Pacific R. Co. v. American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. Ed. 269. However, the bank officials closed the bank. If the holidays were illegal, then they were not legally compelled to obey."

So here, if the proclamation of the governor was illegal, the bank officers and directors were in no way bound by the same and might have ignored it. Likewise, if the appointment of the conservator and his acts were, as defendant contends, illegal and unconstitutional because of ex post facto character and beyond the powers of the Congress, the time to attack such appointment was when it was made. The officers, directors and stockholders had a right to bring a direct attack upon the actions now complained of; they had a right to resist the validity of the appointment of the conservator and any action by him by proper suit in equity to restrain him. But the directors, officers and stock-

holders may not stand by and fail to assert their complaint against allegedly invalid laws and later when the time comes for assertion of liability, seek to attack collaterally the very things they permitted to proceed without protest.

Defendant alleges that the will of the testator in order to assure faithful execution of the contract to pay his sister a certain income, provided for the establishment of a trust fund to secure the payment of the annuity, and that such trust fund includes the bank stock complained of; that, therefore, the executrix does not hold the stock and the funds in her hands are not liable for the same. However, it appears that the title of the trustee has not vested; that the trustees have never been put in possession of any trust fund; that the administration in the probate court is still pending; that there are unpaid debts. Under the laws of Illinois, the claims of creditors are superior to those of legatees or devisees. Consequently, the title of the trustees is subject to the equities of the creditors and the estate remains with the executrix until the debts have been paid. Creditors have recourse to such funds and it is that recourse plaintiff is seeking to enforce. Defendant relies upon Jones v. Cronkleton, 67 F. (2d) 17 and Jones v. Cronkleton, 67 F. (2d) 21. But in those cases the administration of the estate had been closed and in pursuance of the provisions of the trust, the certificates of stock had been surrendered and new ones issued to the trustee. Obviously, thereafter, the liability for the assessment would attach against the trust estate and not to that of the deceased party. The facts clearly distinguish the case from the present one. Here there has been no transfer of the certificates upon the bank's books; there has been no assignment by the executrix; there has been no transfer of title and the estate of the deceased remains unliquidated in the hands of the executrix.

It might have been better practice for the plaintiff to have made as additional parties defendant the trustees under the will, but though they are proper parties they are

not indispensable, for the estate at the present time is under the absolute control of the executrix, and the trustees' interest therein has not passed to them. The title to all assets is, as we have seen, subject to the claims of creditors.

Defendant earnestly insists that the plaintiff's cause of action is barred by Section 70 Chapter 3 of the Revised Statutes of the State of Illinois which bars claims after one year from the date of the probate of the will, except as to subsequently inventoried property and relies upon the case of Forrest v. Jack, *et al.*, 294 U. S. 158, recently decided by the Supreme Court. Decided the same day was Seabury v. Green, 294 U. S. 165. Upon careful analysis, these cases do not support defendant's contention. The holding in the case of Forrest v. Jack, supra, was to the effect that the estate is not liable for an assessment made after final distribution of the deceased's property and after the cessation of existence of such estate. The court held that the liability for the assessment continues unimpaired until valid assignment of the shares is made by final distribution or by other transfer and that the liability "cannot be thwarted or impeded by state law." In the latter case the court said:

> "For the want of capacity the minors are not subject to the assessment. The shares, though in form transferred to their names on the books of the bank, actually continued to be and still are a part of the testator's estate. Early v. Richardson, 280 U. S. 496, 499. Of. McNair v. Darragh, 31 F. (2d) 906. And the estate continued to be liable as a stockholder under Section 66. The liability was not by the Congress intended to be limited to property actually in the hands of the personal representative when the bank became insolvent or when the comptroller's assessment was made. Section 64 imposes liability upon the stockholder while living. Section 66 lays the same burden upon his estate. The purpose of the latter is to make the estate liable for the comptroller's assessment made after the stockholder's death just as it is liable for decedent's indebtedness arising before he died. * * * As suggested in Forrest v Jack, supra, the enforcement of liability im-

posed by Section 66 may not be thwarted or impeded by state law."

This is in accord with the public policy of Illinois, for in Mortimer et al v. Potter, Receiver, 213 Ill. 189, even though the liability of a national bank stockholder did not arise until long after the stockholder's death and long after the expiration of the time for filing claims in probate, during all of which period, however, the estate had been administered by a trustee for the benefit of the widow, it was held that the assets of the estate were impressed with the liability. The statute fixing the time for filing claims against the estate is not a general law of limitation but a specific act for facilitating early settlements of estates. Union Trust Co. v. Shumaker, 258 Ill. 568. The court held there that where a claim against a deceased person has remained contingent during the whole period allowed by law for presenting claims against the estate and does not ripen into absolute liability until the estate has been distributed, the claimant may maintain a bill in equity against such legatees to reach the property of the estate received by them. This decision goes much further than it is necessary to go in the present case. In Sanders v. Merchants State Bank, 349 Ill. 547 the claim was not exhibited within the year. It was contingent and had not ripened into maturity, and the court held that the suit was properly brought to reach the funds of the estate and that the remedy provided by the federal statute to recover an assessment may be enforced as long as the assets can be reached regardless of the expiration of the statutory period for filing claims. Mortimer v. Potter, 213 Ill. 178; First Natl. Bank of Hinckley v. Clark, 275 Ill. App. 282; Dairyman's State Bank v. Durham, 271 Ill. App. 249. The statute of Illinois forbids devisees in fraud of creditors. (Cahill's Ill. Statutes, Chap. 59, Secs. 10, 11, 12), and equity affords relief against such action. Durflinger v. Arnold, 329 Ill. 93 and cases there cited.

Defendant contends that the assessment is invalid for the reason that it does not purport to have been made under Section 66. The assessment was made April 2, 1934, and recited that "in order to pay the debts it is necessary to enforce the individual liability of the stockholders as described by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1C156, Act of June 30, 1876, and Sections 23, Act approved December 23, 1913, known as the Federal Reserve Act." The order further recites that by virtue of the authority vested in him by law, the comptroller thereby made an assessment upon the share holders of the First National Bank of Monticello for $150,000.00 and demand upon each and every one of them for the par value of each and every share of the capital stock of the association held by them respectively at the end of its failure. Act Section 1C156 of June 30, 1876 is also Title 1a (U. S. C. A. Section 191).

Under the law, the Comptroller, when satisfied of the insolvency of an association, may, after due examination, appoint a receiver, who shall proceed to close up the association and to enforce the personal liabilities of the shareholders, Title 12, U. S. C. A., Section 191. The law further provides that the stockholders of each national bank shall be held individually responsible for all contracts and debts of the association each to the full amount of his stock. See Title 12, U. S. C. A., Section 63. We have noticed the liability prescribed by statute in Sections 63 and 66 of Title 12.

It was said in Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. Ed. 475, 478: "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or part, and, if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it."

Judge Sanborn in Deweese v. Smith, 106 F. 438, 445 (C. C. A. 8), affirmed 187 U. S. 638, in a case where the defens

was based on an allegation that the assessment was to make good losses sustained by the receiver and for which the shareholders were not liable, said:

> "But this question is not open to litigation in this case. Under the acts of Congress and the decisions of the courts to which reference has been made the Comptroller of the Currency constitutes a *quasi* judicial tribunal, to whose exclusive determination Congress has intrusted the decisions. * * * His decisions of questions within his jurisdiction are, like the decisions of the land department and of other *quasi* judicial tribunals, impervious to collateral attack, and open to avoidance by the court only in a direct attack upon them on the grounds of clear error of law, fraud, or mistake."

This suit is properly instituted by the receiver. It is one necessary to close up the affairs of a national bank, jurisdiction of which Congress has expressly put in the federal courts. The comptroller levied the assessment which stands absolute and effective against any collateral attack. Congress has made the funds of the estate liable for the assessment. The executrix is in possession of the estate. The administration of the estate has not been closed; the statute is directly applicable. Any objection to the legality of the executive proclamation or the comptroller's orders comes too late and should have been asserted in a direct attack. Consequently, the defenses fail.

Plaintiff is entitled to a decree fixing the liability of the estate of Frank V. Dilatush for an assessment for the par value of the shares of stock, plus interest thereon according to law and impressing all the assets in the hands of the executrix with a lien to secure such liability. The said liability shall be of the same priority as other claims of the sixth class under the statute of Illinois and said lien shall be enforcible to protect the liability upon such basis. It will be the intent of the decree that said lien shall protect the interests of the plaintiff so that plaintiff will share

equally with other creditors of the sixth class of the estate. Decree is entered simultaneously herewith.

The foregoing is adopted by me as my findings of fact and conclusions of law in conformity with Equity Rule 70½ of the Supreme Court.

Entered this 11th day of May, A. D. 1936.

(Signed) WALTER C. LINDLEY,
Judge.

CERTIFIED COPY.

United States of America, Eastern District of Illinois, ss:

I, D. H. REED, Clerk of the United States District Court in and for the Eastern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Opinion filed and entered on the 11th day of May, A. D. 1936, in the matter of J. R. DRAKE, RECEIVER OF THE FIRST NATIONAL BANK OF MONTICELLO, ILLINOIS vs. ANNIE DILATUSH, EXECUTRIX OF THE ESTATE OF FRANK V. DILATUSH, DECEASED, IN EQUITY NO. 730-D, as fully as the same appears from the original OPINION now on file and of record in this court and in my keeping. Now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Danville, Illinois, this 30th day of September, A. D. 1936.

D. H. REED,
Clerk.

(Seal)

By VERNA PECK,
Deputy Clerk.